

NOVEMBER 26, 1985 P.M. SESSION.

26, 1985

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
FOR THE COUNTY OF SANTA BARBARA

ARTMENT NO. 2

HON. BRUCE WM. DODDS, JUDGE

AYNE D. GALBRAITH, et al., )  
Plaintiffs, )  
vs. ) No. 144417  
J. REYNOLDS TOBACCO )  
PANY, et al., )  
Defendants. )

ither here

will have

ix Honor, is

t you'll be  
defendants.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

November 25, 26, and 27, 1985

ARANCES:

Plaintiff: LAW OFFICES OF MELVIN BELL  
BY: MELVIN BELL, ESQ.  
PAUL MONZIONE, ESQ.

Workman and

LAWLER, FELIX & HALL  
BY: THOMAS WORKMAN, ESQ.  
F. JOHN NYHAN, ESQ.

estions --  
th Mr. Weber,

ARCHBALD & SPRAY  
BY: DOUGLAS LARGE, ESQ.

s concerning  
can take  
testimony,

ROBERT WEBER, ESQ.  
Pro Hac Vice

**ORIGINAL**

**DO NOT Remove Permanently**

ninety

OPY

III  
25 through 1079  
NORMA JEAN WINDORST, CSR NO. 2906  
Official Reporter  
Courthouse  
Santa Barbara, California 93101

before he

a moment. Dr.

(Side bar conference not reported.)

THE COURT: Dr. Shimkin, please come up behind the court reporter, please.

MICHAEL B. SHIMKIN,

called as a witness for and on behalf of the plaintiffs, having been duly sworn, testified as follows:

8                   THE CLERK: You do solemnly swear that the testimony  
9 you are about to give shall be the truth, the whole truth, and  
10 nothing but the truth, so help you God.

11 THE WITNESS: I do.

**THE CLERK:** Please be seated.

13 State your full name for the record. Spell your  
14 first name, please.

THE WITNESS: I am Michael Shimkin, at present living  
in - lla, California.

17 THE COURT: Before you proceed with the witness, I have  
18 question I want to ask the jury that counsel has asked me  
19 about.

20                    Obviously, tomorrow is the day before  
21        Thanksgiving. I don't know whether any of you have plans to  
22        be out of town over the holidays or not. We obviously will  
23        not be in session on Friday.

24 I will allow you to -- if you want to break  
25 tomorrow at noon, if there are some of you that have that real  
26 strong desire, I would be influenced by it. However, any  
27 time, of course, we do break that means longer down the line  
28 someplace.

1                   If there is a number of you that wish to break  
2 tomorrow at noon and you had plans -- you're leaving town -- I  
3 would like to know about it now. If not, we'll probably  
4 proceed through tomorrow afternoon. If there is anyone that  
5 feels that they would like to break tomorrow at noon or at  
6 least 1:00 --

7                   (Whereupon, hands were raised.)

8                   How about anybody else?

9                   What -- Miss Coyne, is there something that is  
10 "just like to" or some requirement?

11                  JUROR COYNE: It's not a plan, but a day before  
12 holiday -- I, like everyone else, am having -- not like  
13 everybody -- I am having twenty-one for dinner, and we are  
14 going out of town tomorrow evening.

15                  THE COURT: I would like to go out of town if I was  
16                  having twenty-one for dinner.

17                  Miss Benko.

18                  JUROR BENKO: I am just having a lot of guests there  
19 Thanksgiving.

20                  THE COURT: What is everyone else's desire? I will try  
21 to be guided by what your general desires are in this matter.  
22 If you would rather proceed, I can understand, Miss Coyne's  
23 and Miss Benko's situation.

24                  Maybe we will try to break about three o'clock  
25 tomorrow. Would that -- would that be helpful to everybody?  
26 Let's try to do that and compromise and give something for  
27 everybody.

28                  Mr. Monzione.

1 DIRECT EXAMINATION

2 BY MR. MONZIONE:

3 Q Good afternoon, Dr. Shimkin.

4 Doctor, you are a medical doctor; is that  
5 correct?

6 A Yes, I am.

7 Q When did you obtain your MD, please?

8 A In 1937 from San Francisco.

9 Q That was University of California?

10 A University of California.

11 Q Following your obtaining your medical degree in  
12 1937 at the University of California you did a residency; is  
13 that correct?

14 A Yes.

I had a residency. After interning in an army  
al., I had a residency in Galveston, Texas.

17 Q Then following your residency at Galveston, you  
18 were a Research Fellow at the National Cancer Institute at  
19 Harvard University in Cambridge, Massachusetts?

20 A That's correct, yes.

21 Q What year was that?

22 A That was '38 to '39, I believe.

23 Q Now, Doctor, would you tell us what is the  
24 National Cancer Institute, please?

25 A In 1937, Congress organized and set in motion the  
26 National Cancer Institute as a special branch of the Public  
27 Health Service to accentuate research on the causes of cancer  
28 and prevention of cancer.

1                   Part of their program was a new one of a  
2 fellowship, and I was fortunate enough to be one of the very  
3 early ones selected for that duty and assigned at Harvard  
4 until the building for the activity was erected in Bethesda,  
5 Maryland, where the National Institutes of Health are.

6                   Q     To understand your testimony, Doctor, the  
7 National Cancer Institute was set up by some enactment of  
8 Congress; is that correct?

9                   A     Yes, yes.

10                  Q     Do you know whether that was a unanimous decision  
11 on the part of Congress?

12                  A     Yes.

13                  Senator -- I forget his name -- from Washington  
14 State introduced that. It was one of the few acts that was  
15 unanimously passed by both houses.

16                  Q     Why is it, Doctor, that you did your research as  
17 a research fellow at the National Cancer Institute at Harvard  
18 University?

19                  A     Well, the building was not finished at Bethesda,  
20 and they had a laboratory already at Harvard to which I was  
21 assigned.

22                  Q     Now, could you explain for the jury what is a  
23 research fellow?

24                  A     It's a sort of an apprenticeship, a stipend given,  
25 to look into a topic and see how well you're doing and if you  
26 want to proceed, and you get into some other position with  
27 the -- either university or another university.

28                  Q     During what time period were you a research

1 fellow for the National Cancer Institute?

2 A Oh, a little over a year.

3 Then I elected to get a commission in the Public  
4 Health Service, which I did, and continued the same work there  
5 until we were transferred to Bethesda, actually. I believe it  
6 was '39, but it may have been '40. I don't know.

7 Q Doctor, I am going to ask at this time to show  
8 you an exhibit. I am going to ask this be marked Plaintiffs'  
9 24, I guess, your Honor, sequentially.

10 THE COURT: Have you shown it to Mr. Weber?

11 MR. MONZIONE: This is a curriculum vitae, which he has  
12 seen. I have a copy.

13 THE COURT: Are you going to be admitting this into  
14 evidence?

15 MR. MONZIONE: Eventually, we will move for its  
16 admission, yes, your Honor.

17 THE COURT: Mark it.

18 Counsel approach the side bar for a moment  
19 without the reporter.

20 (Side bar conference not reported.)

21 Q BY MR. MONZIONE: Doctor, I am going to place  
22 before you Plaintiff's Exhibit No. 24 for identification. I  
23 do that so you can refer to that and refresh your recollection  
24 from time to time as to specific questions.

25 You've testified, Doctor, that, as a research  
26 fellow at the National Cancer Institute, you were engaged in  
27 some research projects.

28 What specifically did your work as a research

1 fellow entail, please?

2           A     This work was primarily on mice and cancer  
3 producing agents in our environment. It was only a few years  
4 since the pure chemicals from tar had been isolated and, also,  
5 the female sex hormones, and these seemed to have been  
6 related.

7                 One of the first topics that we dealt with was to  
8 try to explain why there was a rise in lung cancer deaths  
9 recorded in many places in the United States.

10              We took as our hypothesis that this was due to  
11 some inhalant because we knew from previous experiments that  
12 inhalation, for example, of radioactive ore in the Black  
13 Forest of Germany produced an epidemic of lung cancer,  
14 probably because of inhalation of that material. So, we

15              posed that something that was being inhaled had something  
16              with this phenomenon of increased lung cancer in men.

17              However, it was hard to explain why that only should be in  
18              .. because woman also breathed the same air, but we decided  
19              to go ahead anyway.

20                 The research endeavor entailed gathering samples  
21 of air from very polluted cities in the United States,  
22 including the Holland Tunnel in New York and in Pittsburgh.

23              Q     Let me interrupt you for a second. I would  
24 rather take it step-by-step. Let me ask you specific  
25 questions for specific answers if I may.

26              A     Of course.

27              Q     Now, Doctor, I believe you said that, at that  
28 time in 1937, an increase in rising mortality rates due to

1 lung cancer in males was observed.

2 Is that correct?

3 A It was recorded.

4 The first question we had was to ascertain  
5 whether there was a true increase or a fictitious one due to  
6 other factors such as better diagnosis and better regulations.

7 Q And were any steps taken to determine if, in  
8 fact, it was a true increase in the rise of lung cancer  
9 mortality at that time?

10 A Oh, yes.

11 There were lots of investigations about that, and  
12 they came to the conclusion that there was something going on  
13 that was killing more men from lung cancer.

14 MR. WEBER: Objection, your Honor. That wasn't  
responsive to the question that was asked.

THE COURT: Sustained.

17 Counsel approach the side bar  
18 (Side bar conference not reported.)

19 Q BY MR. MONZIONE: Now, Doctor, with regard to the  
20 research work you did as a fellow concerning the increase in  
21 lung cancer mortality, were any conclusions reached by you or  
22 by the National Cancer Institute at that time concerning the  
23 function of air pollution and the increase of lung cancer?

24 A This specific question of whether the rise was  
25 real or fictitious was not something I was involved in.

26 This was by the biometrists and other people  
27 down in Washington. And this, of course, strengthened the  
28 work we were doing with mice.

1           Q     What work were you doing with mice in that  
2     regard?

3           A     Well, as I said some of us gathered dust in the  
4     dirty parts of some cities. I mentioned two of them.

5           Q     Did you -- were you engaged in animal  
6     experimentation in that respect?

7           A     Yes. The dust samples were taken to the  
8     laboratory, extracted with appropriate solvents, and then I  
9     had the samples and injected them into mice and then observed  
10    what would happen to these little animals.

11          Q     Did you have any results from the injections  
12    which were given to mice with respect to these concentrates?

13          A     Yes.

14          We published this in 1943 eventually, but about  
15    percent of the mice developed malignant tumors at the site  
16    injection.

17          Q     Doctor, what is a malignant tumor, Doctor?

18          A     We use the route by injecting this material under  
19    the skin so you don't get the so-called carcinomas that you  
20    get if you paint the skin.

21          Instead you get a connective tissue tumor which  
22    we call sarcoma. These are also malignant tumors that can be  
23    transplanted, and that it was metastasized and fulfilled other  
24    criteria of malignant neoplasm.

25          Malignant neoplasm also means cancer.

26          THE COURT: Doctor, I think we'll have some problems  
27    with phraseology. I think you'll be using words that we may  
28    not all understand.

1 Try to listen to Mr. Monzione's question really  
2 closely.

3 THE WITNESS: I am.

4 THE COURT: I think it had to do with another area that  
5 may not have been covered.

6 Try again.

7 Q BY MR. MONZIONE: You mentioned the word  
8 "neoplasm" just now. Would you explain what "neoplasm" is?

9 A A "neoplasm" is another fancy word for cancer. I  
10 think that is correct. It means "new growth" in Greek.

11 Q Is it true, Doctor, that a neoplasm can be either  
12 benign or malignant?

13 A That is correct.

14 Q "Malignant" meaning what?

15 A "Malignant" means this is the thing that kills  
16 In other words, this is the real, true blue cancer which  
17 penetrated until the tissue metastasizing in other places can  
18 kill the host, whether it's an animal or human being.

19 Q Now, Doctor, you mentioned that you noticed a  
20 phenomenon between sexes regarding the increase of mortality  
21 rates due to lung cancer.

22 Did you --

23 MR. WEBER: Let me object that I am -- I am not sure  
24 the doctor has said that so far.

25 THE COURT: I don't think he said it in quite that way.

26 MR. MONZIONE: I thought he did. I will try to  
27 establish that.

28 THE COURT: Establish it. You may be correct. I might

1 be wrong.

2 Q BY MR. MONZIONE: Doctor, was any difference  
3 noted between the increase in mortality rates between the  
4 sexes with regard to lung cancer that the --

5 A This is human, I presume.

6 Q That is correct, not mice.

7 A Yes. One of the obvious things is the phenomenon  
8 occurring among men and, if anything at all, hardly any of the  
9 women.

10 Q Was there some explanation for the reason of the  
11 differences between sexes?

12 A At that time, no.

13 Q Later on was -- did research reveal some personal  
14 habit or phenomenon that contributed for the difference?

15 A Yes, definitely. That was because men were  
smoking, and woman were not at that time.

16 Q This was at what time, approximately, Doctor?

17 A This was '39, approximately.

18 Q Now, after your stint as a research fellow at the  
19 National Cancer Institute, I believe you testified you joined  
20 the Public Health Service.

21 A Is that correct?

22 A Yes.

23 Q For how long did you remain in the employ of the  
24 Public Health Service?

25 A I am one of the thirty-year men. I retired after  
26 that.

27 Q Now, Doctor, the document which I have placed

1 before you marked as Exhibit 24, I believe, would you describe  
2 what that is please?

3 A Oh, this is what we we call a CV, curriculum  
4 vitae, or a short brief presentation of my experience and my  
5 assignments.

6 Q As you look it over, Doctor, is it correct and  
7 accurate as to the information set forth on the document?

8 A Yes.

9 It's far from complete, but I didn't want to make  
10 it too long.

11 Q And it says that, in 1945 through 1946, you were  
12 the Assistant Chief at the Office of International Health  
13 Relations.

14 Could you explain what that was please, Doctor?

15 A Well, during the war, of course, I was detailed  
16 for a variety of positions in the Public Health Service,  
17 including a mission to Moscow to trade some presumed secrets,  
18 with the Soviets during the war.

19 I wound up at the public health office in George  
20 Patton's Third Army; and, after the war was over, instead of  
21 returning to the Cancer Institute, the Surgeon General wanted  
22 me to help him in establishing the World Health Organization,  
23 because the League of Nations organization had folded up by  
24 that time.

25 So, I had a small office in his bigger office and  
26 a small staff, and we did the paperwork to prepare for this,  
27 which was finally culminated in New York in an international  
28 conference.

1           Q     Next in order on your curriculum vitae, it says  
2     that you were the Director of the Laboratory of Experimental  
3     Oncology and Clinical Professor of Medicine at the University  
4     of California School of Medicine, San Francisco from 1947 to  
5     1954.

6                      Doctor, what is "oncology"?

7           A     "Oncology" is again another fancy name for cancer  
8     or tumors. It's a Greek word for tumors actually.

9           Q     What is meant by Laboratory of Experimental  
10    Oncology?

11          A     Well, we had not only a laboratory in the usual  
12    sense of animals, but we also had a fifteen-bed ward in which  
13    we treated advanced patients with advanced cancer with the few  
14    experimental drugs for it that were coming out at that time.

15                 During the seven years, we treated about five hundred such  
16    people.

17                 The assignment to California came on my request,  
18    because I didn't like to stay in administration in  
19    Washington,, and it was a very happy period of seven years  
20    until I was recalled back to the Cancer Institute.

21          Q     As the Director of the Laboratory of Experimental  
22    Oncology, were you involved in animal experiments at that  
23    time?

24          A     No.

25                 We had a small animal colony on which we  
26    continued some of the work I was interested in, but our main  
27    emphasis was clinical. That was the treatment of advanced  
28    cancer in man.

1           Q     Was there some research which you were engaged in  
2       in connection with that position?

3           A     Oh, yes, quite a number of lines.

4           Q     Specifically, was there some research into the  
5       cause and treatment for cancerous tumors?

6           A     That was the -- not necessarily about the cause.  
7       We were concerned at that time with patients who already had  
8       cancer and their treatment.

9           Q     Now, from the University of California at San  
10      Francisco, you then were the Chief of Biometry and Epidemiology  
11      Branch of the National Cancer Institute from 1954 to 1960.

12           What is "biometry," Doctor?

13           A     Biometry is -- "metry," of course, means  
14      measurement and "bio," means life, biology. So, this is a  
15      science that is primarily scientific, which tries to measure  
16      ... quantitate biologic phenomenon. And, of course, our main  
17      concern was cancer. So, this was primarily biometry of  
18      cancer.

19           Q     Now, it says also the Epidemiology Branch.

20           Could you explain what the Epidemiology Branch of  
21      the National Cancer Institute is?

22           A     Yes.

23           This was a group of people who were trained in  
24      epidemiology, again, to address certain topics of significance  
25      and interest in the field of cancer.

26           THE COURT: What is "epidemiology"?

27           MR. MONZIONE: I was going to request that.

28           THE WITNESS: "Epidemiology" is a term invented by

1       Hypocrates, the father of medicine. It means -- "epi" is  
2       upon; and "demos," democracy; "mon," people. So, it is the  
3       study of things that involve populations.

4                  It is a science in which the distribution and  
5       relationships and cause of disease in man is first, of course,  
6       gathered as data and then analyzed. And also it can be  
7       applied to animals, in which case it is called epizootiology.  
8       That is unimportant.

9                  Q       Now, Doctor you said that epidemiology is a  
10      science.

11                  Is that correct?

12                  A       Oh, definitely. It is as much of a science as  
13      cardiology or pathology. It does not stand on its own feet,  
14      however. It interlinks findings in these other sciences.

15                  Q       After your being the chief of Biometry and  
16      epidemiology at the National Cancer Institute, you were the  
17      chief of Cancer Biology at Fels Research Institute in  
18      Philadelphia from 1963 to 1965; is that correct?

19                  A       That is correct. But I think you have  
20      interrupted a group of assignments there that may be important  
21      to you.

22                  Q       I am sorry -- I skipped -- if I may go back and  
23      ask you -- you were, according to your CV, Doctor, the  
24      Associate Director of the Field Studies at the National Cancer  
25      Institute.

26                  Can you explain what that -- what did that  
27      position entail?

28                  A       As you know, government agencies have a way of

becoming larger, and their titles and all that become inflated. So, during the time I was there, these branches of which I was head were promoted to a subdivision called Field Studies. I was made the chief of that.

I held two other jobs at the same time there. I was editor of the Journal of the National Cancer Institute for five years, and I also was the chairman -- I guess it was called director -- of the chemotherapy studies that were being organized at this institute.

Q The National Cancer -- rather the Journal of the National Cancer Institute, is that a publication of the National Cancer Institute under the auspices of the National Cancer Institute?

A Yes, but it accepts articles from all over the world. It's a regular scientific journal.

Q Does it publish articles concerning research which has been done on the causes of various cancers?

A Oh, yes. That is one of its fields, of course.

Q As the Associate Director for Field Studies, what are Field Studies as referred to in that title?

A Well, it just differentiates between studies being carried in-house and projects being organized out-house or outside the house -- if you'll excuse me.

Q Were these studies concerned with cancer and its cause?

A Oh, yes. The whole Cancer Institute aim is cancer, of course.

Now, after that -- I believe I have already

1 mentioned you were Chief of Cancer Biology at Fels Research  
2 Institute in Philadelphia from 1963 to 1965?

3 A '69.

4 Q I am sorry. That is correct.

5 Could you explain what that entailed?

6 A Well, I retired from the Public Health Service,  
7 having served my time, in 1963. I was invited to join Temple  
8 University in Philadelphia. The head of the medical parts of  
9 it, at that time, was an ex-Surgeon General and a friend of  
10 mine, Dr. Lee Burney. So, I took that position of heading the  
11 biological aspect of one of the institutes and being professor  
12 of medicine at the institution.

13 Q You taught medicine there at the same time?

14 A Yes, I did.

15 Q Any particular areas of medicine that you taught?

16 A Internal medicine. That is what I was qualified  
17 for.

18 Q By the way, Doctor, do you have any board  
19 certificates in medicine?

20 A Yes. I am. I have board certificates in  
21 internal medicine and another one in preventive medicine.

22 Q I am not sure if the jury would know.

23 What is internal medicine, Doctor?

24 A It's diagnostic medicine, general treatment,  
25 excluding surgery. They also exclude skin diseases, which is  
26 covered under dermatology. Anything under the skin is the  
27 province of the internist.

28 Q That included cardiovascular?

1 A Yes.

2 Now, it's again become more complicated and split  
3 in subdivisions: cardiology pulmonary diseases, you name it.  
4 The whole thing is encompassed under the group called internal  
5 medicine.

6 Q As a board certified -- as being board certified  
7 in internal medicine, you have expertise with respect to the  
8 cardiovascular system, the pulmonary system, and so forth?

9 A Well, I am supposed to know it, but I don't claim  
10 expertise in it. There are people that are better qualified  
11 than I am.

12 Q Now, presently, Doctor, do you have any  
13 professional associations in which you are engaged?

14 A Well, I left Temple University in 1969 because I  
15 was invited to join the new medical school in San Diego, UCSD.  
16 That is where I still am, from '69, as Professor of Community  
17 Medicine and Oncology.

18 But in 1980, I reached the age of retirement, and  
19 I was made what is called Professor Emeritus. I am still  
20 Professor Emeritus.

21 I do a little teaching and writing and whatnot.  
22 I don't get paid for it anymore, but that is about the  
23 difference.

24 Q Since the time that you retired from the National  
25 Cancer Institute, you've done a number of consultation  
26 activities; is that correct?

27 A Oh, yes, yes.

28 Q I believe that on your curriculum vitae that you

1 were a consultant for the National Cancer Institute from 1963  
2 to 1980.

3 Is that true?

4 A That is correct.

5 Q You've also -- in addition to being the editor of  
6 the Journal for the National Cancer Institute, you've had  
7 other editorships?

8 A Correct.

9 I became editor of a journal called Cancer  
10 Research while I was at Temple. I had to give that up when I  
11 transferred to California. I am still what is called a "cover  
12 editor" for the journal.

13 Q Doctor, on the second page of Exhibit 24 that you  
14 have before you, it notes that you are the author of a  
15 publication entitled "Science and Cancer"?

16 A Yes.

17 Q Could you explain what that publication is, and  
18 what the topic it entails is?

19 A "Science and Cancer" is a description of science  
20 and what its impact upon cancer is, which was written on  
21 contract for the National Cancer Institute primarily for the  
22 lay public, and it has gone through four editions since '64.  
23 It has been translated into Japanese and, I think, in Russian  
24 as well. Anybody who wants a copy can write to the Cancer  
25 Institute for one.

26 Q Now, Doctor, you also are the author of a  
27 publication entitled "Contrary to Nature," 1977.

28 Is that correct?

1 A That is correct.  
2 Q What is that -- is that a book?  
3 A That is a big book --  
4 Q And --  
5 A -- and the only coffee table cancer book ever  
6 written. It's an illustrated history of cancer with many  
7 illustrations.  
8 Q You say it's an illustrated history of cancer?  
9 A That is correct.  
10 Q Did you conduct the research on the history of  
11 cancer prior to writing that textbook -- or prior to writing  
12 that book, rather?  
13 A Yes.  
14 And part of it was based on this co-editorship  
cause that required illustration, and they regrouped the  
same thing. I might explain why "Contrary to Nature," if I  
17 may.  
1 It's an ancient term for cancer. It's "tumor against  
19 nature." I thought it would make it a little sexy by making  
20 that title.  
21 Q Now, Doctor, what is -- it says that, also, you  
22 are the author of "As Memory Serves."  
23 Is that also a book on cancer?  
24 A That was another one which I was requested by the  
25 National Cancer Institute to write. It's a history of the  
26 Cancer Institute and my involvement with it. It's a very kind  
27 of personalized thing.  
28 MR. MONZIONE: Your Honor, I am going to ask that

1 plaintiffs mark as next in order Exhibit 25. I will show it  
2 to counsel first.

3 THE COURT: It will be marked for identification.

4 When we break today, we'll stay and go through  
5 all of these exhibits and get them all marked.

6 Q BY MR. MONZIONE: Dr. Shimkin, I am going to  
7 place in front of you Plaintiff's Exhibit 25.

8 Could you look at that please, and tell us what that  
9 is?

10 A This is a list of my publications from '36 until  
11 almost up to date. It has somewhere over three hundred items.

12 Q Over three hundred publications?

13 A Yes.

14 Q Many of those deal with the subject of cancer; is  
15 it correct?

16 A I would say probably easily eighty percent do,  
17 es.

18 Q Many of them also deal with studies which have  
19 been conducted of epidemiologic nature concerning the cause of  
20 cancer?

21 A Not necessarily epidemiologic, but they all  
22 relate in one way or another to cancer's causation, treatment.

23 Q Now, Doctor, with all of your background and  
24 research on cancer, what is cancer?

25 A Cancer is a great group of diseases, which can  
26 involve any tissue of the body in which the cells of which  
27 that tissue is composed, for reasons we really don't  
28 understand, do not behave normally anymore, and have

1        limitations of growth. For example, if you wound your skin,  
2        it heals and the scar forms and the process stops.

3              A cancer cell, contrary to nature, can keep on  
4        going, multiplying, dividing and invading the contiguous  
5        tissues. Eventually, some cells break off and, through the  
6        blood vessels or lymphatic channels or other ways, set up  
7        colonies somewhere else in the body, so I assume, which may  
8        arise in the stomach; a colony may wind up in the brain  
9        through the blood system. Obviously, it's one of the more  
10      dreaded of diseases, because relatively little can be done for  
11      it.

12              The basic cancer must involve a change in the  
13        genetic mechanism of the cell. This is what the scientists  
14        today are struggling with to find the exact changes.

15              Q        Doctor, do you have an opinion as to whether  
16        science understands in any respect the mechanism by which  
17        cancer develops?

18              A        Oh, I think we have reasonable hints about  
19        various features of its development, yes; but they have not  
20        been yet very effectively turned towards what our ultimate  
21        goal is, and that is prevention and cure of cancer.

22              Q        Does science understand -- in your opinion, does  
23        science understand the mechanism of cancer?

24              A        I think that you have to divide this word,  
25        because we know the exact mechanism of practically no disease.

26              MR. WEBER: Your Honor, the question called for a  
27        general answer. I am not sure where we are going.

28              THE COURT: That answered the question where we are

1 right now.

2 Let's proceed.

3 THE WITNESS: May I go on?

4 THE COURT: No. That answered the question.

5 If there is another question, you may respond.

6 BY MR. MONZIONE: I didn't know whether the doctor had  
7 completed his answer.

8 THE COURT: I thought he had. It certainly called  
9 for -- his answer was an answer to the question. Beyond that,  
10 it may have been reiterating some other area.

11 If you want to ask something additional to have  
12 him expound further, go ahead.

13 Q BY MR. MONZIONE: Doctor, do you have an opinion  
14 as to whether science understands some of the causes of  
15 cancer?

16 A Oh, yes.

17 There are some forms of cancer, which we  
18 understand the cause of quite explicitly. Without --

19 THE COURT: Let's -- Doctor, most of those questions  
20 may call for a "yes" or "no."

21 Then Mr. Monzione may ask you to expound on it  
22 further. I am going to ask you to answer "yes" or "no" on the  
23 ones that call for it.

24 If he asks you to explain why, we'll allow you to  
25 proceed, okay.

26 THE WITNESS: A professorial disease, your Honor.

27 THE COURT: Proceed Mr. Monzione.

28 Q BY MR. MONZIONE: Doctor, I believe you said,

1 "Yes," you have an opinion as to whether science understands  
2 the causes of cancer; is that correct?

3 A Some cancer.

4 Q Now, what are some of the causes of cancer in  
5 general as is explained by science presently?

6 A Well, we have quite a group of chemicals -- I  
7 mentioned some of them already -- which, upon exposure of  
8 either animals or humans, lead to the formation of cancer.

9 Q The history of cancer is something with which  
10 you've been engaged professionally in your writings and  
11 research and otherwise; is that correct?

12 A Yes.

13 Q Is this a phenomenon that has been observed for  
14 some period of time?

15 MR. WEBER: Objection, your Honor. I am not sure what  
16 phenomenon he is referring to.

17 THE COURT: I will sustain the objection on ambiguity.

18 Q BY MR. MONZIONE: I am talking about cancer,  
19 Doctor.

20 Is that something that has been observed  
21 historically in medicine?

22 A Yes. It has.

23 Certainly, the appearance of cancers of the mouth  
24 and lip was associated with pipe smoking in 1795.

25 Q When was the first recordation or discovery, if  
26 you will, of cancer?

27 A Oh, that goes back as far as medical records are  
28 in existence. Hippocrates named it cancer.

1 Q Hypocrates called the illness cancer?

2 A Yes.

3 "Cancer" is the Greek word for crab.

4 Q When was that history, around what date?

5 A 500 BC.

6 Q Now, Doctor, have you ever contributed to any  
7 studies on the issue of cigarette smoking and illness,  
8 particularly cancer?

9 A Yes.

10 MR. WEBER: Objection, your Honor. So it's limited to  
11 cancer at this point, I thought was the understanding.

12 THE COURT: All right.

13 I am going to ask to you rephrase it with regard  
14 to cancer until we have an opportunity to rule on that, on  
15 those issues, outside the presence of the jury.

16 Q BY MR. MONZIONE: Doctor, have you been involved  
17 in any studies regarding the issue of cigarette smoking and  
18 cancer?

19 A Yes, very much so.

20 Q Looking at Exhibit 25, which is before you, the  
21 list of your publications, are there any publications  
22 specifically on that list that deal with the issue of  
23 cigarette smoking and lung cancer?

24 A Yes.

25 I think I marked some with an "X" for --

26 Q Now, Doctor, let me ask you: In 1957, did you  
27 publish any articles or research regarding the issue of  
cigarette smoking and cancer?

1 A I was a member of a group that did, yes.

2 Q What specifically was that group?

3 A It was a group that was formulated by four  
4 organizations: The National Cancer Institute, The National  
5 Heart Institute, The American Cancer Society, and The American  
6 Heart Association.

7 They -- do you want me to go ahead?

8 Q Let me stop you there.

9 What did this group do with respect to that  
10 research project?

11 A This group was given the task of evaluating the  
12 information that was available that -- and to give their  
13 opinion regarding the problem of smoking and health.

14 THE COURT: Why don't we take our recess at this time.

15 We have about two or three matters that we have  
16 to take up outside the presence of the jury. One relates to  
17 this witness, and then we have a couple of others.

18 So, ladies and gentlemen, I am going to ask you  
19 to come in at 9:00 in the morning. Why don't you -- as far as  
20 I know, we'll have completed everything at that point. Just  
21 come in and take your seats. We will try to start at 9:00.

22 I don't think we'll have any delays in the  
23 morning. We'll take now, hopefully. That is the  
24 reason for the break now.

25 Remember the admonition: Do not discuss the case  
26 among yourselves nor with anyone else, nor make up your mind  
27 about it until it's finally submitted to you. We will see you  
28 tomorrow at 9:00. We will stay this session.

(Whereupon, the jury was excused and the following proceedings were held:)

THE COURT: The first thing I would like to take up with counsel is the question of plaintiffs' in lieu of subpoenas for production of documents and attendance of parties.

The way I look at Code of Civil Procedure Section 1989, it specifically refers to subsection (b) of Civil Code -- Code of Civil Procedure Section 1987, which says that the witness has to be within the state.

It seems to me that takes care of the matter unless you can show me something different, Mr. Monzione. The people that you have noticed reside not within the State.

MR. MONZIONE: I have noticed them by description, your Honor, so I don't know how they can say that the people aren't within the State.

The individual who we've named specifically Vice President of R.J. Reynolds -- I forget his name -- if he's no longer with R.J. Reynolds, that is understandable. We've stated in the notice that we wanted someone designated by R.J. Reynolds who has this information and --

THE COURT: If they come back and tell us that person is not within the state, that takes care of it all.

MR. MONZIONE: I think 1987, subsection (b) provides jurisdiction for this Court.

THE COURT: Stop shifting gears. It says here if they are not within the state, they don't have to appear. How do you get around that?

1                   The fact that you have jurisdiction over the  
2 corporation is a given. I know that. It says that, if they  
3 are a witness, they don't have to appear if they are not  
4 within the state.

5                   Now, how do you get around that?

6                   MR. MONZIONE: I don't know how we are going to have  
7 someone from R.J. Reynolds come in and testify then.

8                   THE COURT: I don't know how you are either.

9                   MR. MONZIONE: If you have jurisdiction over the  
10 corporation the only way the corporation can act is through  
11 its agents. You have jurisdiction over the agents. I have a  
12 designated corporate officer, director or some other person  
13 designated by R.J Reynolds. That is how the corporation acts.

14                  THE COURT: I have not seen the designation. Do you  
15 have them someplace? They weren't attached to your material,  
16 Nyhan. I think you're the one involved in this.

17                  MR. NYHAN: We filed our opposition or our objection to  
18 heir notices on November 14, your Honor. We did not attach  
19 copies of the designation.

20                  THE COURT: I have not seen the designation.

21                  Do we have a copy of them somewhere?

22                  MR. MONZIONE: We filed it with the Court, your Honor.

23                  THE COURT: Let's see if we can find them.

24                  Do you know what dates filed them, Mr. Monzione?

25                  MR. MONZIONE: Obviously, prior to the --

26                  THE COURT: We are someplace around Volume XIII now.

27                  MR. NYHAN: Ten days before, your Honor. I think it  
28 was on the 4th of November.

1 THE COURT: There is one on the 7th that says "Notice  
2 in Lieu of Subpoena for Production and Attendance of Party."  
3 Is that the one we are talking about? This was signed by Mr.  
4 Monzione and dated November 4.

5 MR. MONZIONE: I believe that is correct, your Honor.  
6

7 THE COURT: There is another other one besides that.  
8

9 MR. MONZIONE: I filed two.  
10

11 MR. NYHAN: He filed three. The three bear the same  
12 title, and they are filed on the same date.  
13

14 THE COURT: I see all three of them. Give me a moment  
15 to look at that.  
16

17 (BRIEF PAUSE)

18 THE COURT: Mr. Monzione, you want them to produce  
19 somebody that will tell you about the health effects of  
20 cigarettes from 1927 on, and the ingredients in certain  
21 cigarettes from 1927 on.  
22

23 Now, if they declare under penalty of perjury the  
24 testimony that there is no such person in the State of  
25 California, doesn't that take care of the matter? I haven't  
26 done that yet. I will require them to do that. Assuming for  
a moment they can -- I don't know whether they can or not  
under the statute -- doesn't that take care of it?

27 MR. MONZIONE: I don't think it does, your Honor,  
28 because, if the Court has personal jurisdiction over the  
corporation, it's kind of like it's a phantom party litigant  
to the case not to have them here.

\*27 They would have the right to send out the same  
28 notice and have the plaintiffs in the courtroom throughout the

1 duration of the trial, so they could call them adversely under  
2 776 and have them testify.

3 THE COURT: What if one of these people, just one of  
4 them, lived in New York?

5 MR. MONZIONE: They would be compelled to attend  
6 because the Court has personal jurisdiction over these  
7 individuals as --

8 THE COURT: Give me some authority for that. I've seen  
9 nothing. I do not believe that is a correct statement of the  
10 law.

11 MR. MONZIONE: I think that, if there is a party  
12 litigant on any case, the Court has jurisdiction to compel the  
13 attendance. If the plaintiff is residing outside of  
14 California, you could enter a default judgment, dismiss their  
15 action, anything that would be dispositive. You would have  
jurisdiction. You would have -- I think the same is true with  
the corporation. It can only be handled through its agents.

16 THE COURT: Give me some authority. You made a  
17 statement that one of the plaintiffs, if they weren't here and  
18 lived in New York and a motion to produce or a notice in lieu  
19 of subpoena were served on them pursuant to 1987(b), they  
20 would have to appear. I do not believe that is a correct  
21 statement of the law. If you can show me it is, I will review  
22 my comments. I've seen nothing to indicate that. It seems to  
23 me just the opposite is true.

24 MR. MONZIONE: We are in the process of putting  
25 together a brief on that subject. I would like the  
opportunity to submit some points and authorities.

1 THE COURT: I asked for that a week ago. I told you we  
2 were going to get -- do this this afternoon.

3 Earlier today, you told me there were no points  
4 and authorities and you were doing it orally.

5 MR. MONZIONE: The only thing we could find was  
6 1987(b), which I thought would give you jurisdiction over the  
7 corporate agents.

8 If I designated now in lieu of subpoena that R.J.  
9 Reynolds is to produce a corporate agent in this courtroom as  
10 any other party litigant would have to appear, and they say  
11 under penalty of perjury that no such individual resides in  
12 the State of California, that means that no one from R.J.  
13 Reynolds is going attend this trial.

14 THE COURT: I have no idea whether anybody from R.J.  
15 Reynolds is going attend the trial. Certainly, they have  
16 people who represent them in the State of California. You've  
17 not asked for that.

18 You've asked for people who have knowledge and/or  
19 information regarding any and all tests and/or studies  
20 conducted, reviewed or used by R.J. Reynolds Tobacco Company  
21 between the years 1927 to the present regarding the health  
22 effects of its cigarette products on the consumers of same.

23 If they tell me under penalty of perjury that no  
24 such person exists in the State of California, that is not the  
25 same thing as there is no such person that would be here from  
26 R.J. Reynolds at all; that you could not have -- apparently,  
27 there may very well be an agent of R.J. Reynolds that is  
28 within the state. I suspect very strongly there are. If they

1 told me there was nobody, I would be highly suspicious.

2 You've asked for a very, very specific person.  
3 That is entirely different than asking for an agent. If you  
4 want an agent to show up, an agent of R.J. Reynolds, that is a  
5 different matter altogether. That is not what you've asked  
6 for. You've asked for somebody who has very, very specific  
7 knowledge. Whether even somebody like that exists, I don't  
8 know.

9 MR. MONZIONE: I think that we've sent out three  
10 notices, your Honor. That one was specific because it called  
11 for documents and someone very specific. I haven't seen  
12 anything under penalty of perjury that the vice president is  
13 no longer with the corporation or that he's out of state.

14 THE COURT: You haven't?

15 MR. MONZIONE: I don't think there has been anything  
16 filed under penalty of perjury at all.

17 THE COURT: Let me read Mr. Nyhan's declaration. Is it  
18 Mr. Nyhan's or -- excuse me -- Mr. Robert R. Gordon, Jr.'s  
19 declaration filed November 14.

20 It says,

21 "I am employed by R.J. Reynolds  
22 Company as its Vice President - Personnel, and  
23 have held this position since June 1, 1984. I  
24 make this declaration based on my personal  
25 knowledge and upon information contained in  
26 records maintained by Reynolds in the regular  
27 course of its business by persons with personal  
28 knowledge of the information report recorded

1                   therein.

2                   "Mr. G. R. Gunzenhauser, to whom a  
3                   Notice in Lieu of Subpoena has been issued, is not  
4                   an employee of Reynolds."

5                   He was formerly an officer and employee, but left  
6                   the employ of Reynolds in 1984 and is no longer an officer of  
7                   Reynolds. Under penalty of perjury attached to the material.

8                   MR. MONZIONE: He is the one that verified their  
9                   interrogatory responses.

10                  THE COURT: So, the fact that he verified their  
11                  interrogatories, he's no longer a party. If you want to get  
12                  him here somehow, get him here. You can't make him appear  
13                  when he's no longer an employee of the corporation.

14                  MR. MONZIONE: What about with respect to the general  
15                  designation requesting that they designate someone? I don't  
16                  think that is addressed in the declaration under penalty of  
17                  perjury.

18                  MR. NYNAN: Paragraph 3, plaintiffs' affidavit  
19                  addresses that's subject, your Honor.

20                  MR. MONZIONE: Thank you, Mr. Nyhan.

21                  THE COURT: (Reading:)

22                  "With respect to the Notices in  
23                  Lieu of Subpoena served by the plaintiffs in  
24                  this matter on November 5, 1985 which are  
25                  directed to Reynolds and it's --" quote --  
26                  'officers, directors or managing agents,' Reynolds  
27                  currently has no 'officers, directors or managing  
28                  agents' who are residents of the State of California."

1                   MR. MONZIONE: I don't think that is determinative of  
2 the jurisdictional question. I don't think one has to be a  
3 resident for the Court for jurisdiction. One simply needs to  
4 have minute contacts under International Shoe and the long  
5 line of cases --

6                   THE COURT: No question about that.

7                   MR. MONZIONE: For them to say, under penalty of  
8 perjury, that no such individual resides in California is an  
9 insufficient showing to this Court that no jurisdiction exists  
10 for us to compel their presence. Residency is not required  
11 for jurisdiction, your Honor.

12                  THE COURT: Residency is not required for jurisdiction.  
13 Residency is required for you to use 1987(b) to have somebody  
14 show up. You're confusing apples and oranges.

15                  If you can give me some law that there is some  
16 relationship between jurisdiction and using 1987(b) to have  
17 somebody show up in lieu of subpoena, fine. You have not done  
18 so.

19                  At this time, I am going to indicate that the  
20 objections to the notice in lieu of subpoena are -- well, are  
21 granted. So, they need not appear unless somehow I  
22 reconsider that. There is just nothing in front of me that  
23 indicates these people have been properly required to be here.

24                  If you want to bring something else to the  
25 Court's attention at a later time that I am not aware of  
26 now -- I gave everybody a week's notice on this.

27                  Let's take up the question of Mr. Shimkin. I  
28 haven't read this inch thick declaration here. What I would

1 like to do is take a couple of minutes and have Mr. Monzione  
2 and Mr. Weber discuss -- perhaps with Mr. Shimkin, who is  
3 here -- what in fact he intends to be offered as a witness,  
4 and we'll find out if there really in fact is any objection.  
5 There apparently isn't. Maybe this is all moot.

6 You're welcome to use my anteroom or the jury  
7 room. I would request that the three of you get together and  
8 find out what the testimony is going to be, so whether we are  
9 spinning our wheels by bringing this issue up, may be the  
10 case.

11 MR. MONZIONE: I know that we are going to have to  
12 resolve it with respect to hypothetical questions, your Honor,  
13 because we intend fully to pose such questions to Dr. Shimkin.

14 THE COURT: While you're reading -- while you're doing  
15 that, I am going to read this to find out what you're talking  
16 about. I am not at all familiar with what Dr. Shimkin is  
17 supposed to be testifying.

18 Now, give me an offer of proof of what you  
19 believe that Dr. Shimkin will testify that hasn't been covered  
20 by way of deposition, which I understand is the basic  
21 objection, although I haven't gone into it in specifics.

22 MR. WEBER: The designation as well, but Mr. Monzione's  
23 representations on the record were that the only subject the  
24 doctor would testify to was general causation between tobacco  
25 and lung cancer, nothing specific with respect to Mr.  
26 Galbraith or any other disease.

\* 27 THE COURT: I haven't looked at the depositions yet.  
28 If I am satisfied that you had an opportunity to and did go

1 into these areas, it's highly likely I will allow the  
2 testimony. If I am satisfied that you did not have that  
3 opportunity and did not go into it because you were misled by  
4 either the designation or something Mr. Monzione said, that is  
5 a separate issue.

6 I have no idea at this time what the situation  
7 is. I haven't looked at the depositions.

8 I will read this material, and I will ask you two  
9 to take a few minutes and we'll try to reconvene at 4:30.

10 (RECESS)

11 THE COURT: I have read the motion, Mr. Weber. There  
12 seems to be a comment that needs to be made at the start.

13 Mr. Monzione, the problems that have arisen  
14 concerning discovery in this case are all related to one  
15 thing: an attempt to get this to trial as soon as possible.  
16 This is another -- it seems to me another example of it.

17 I remember -- and I have mentioned it before --  
18 telling you that you were not prepared to go ahead with this  
19 case and to request a continuance. I would highly likely  
20 grant it for a couple more months when the discovery problems  
21 were arising originally. You insisted that you would be ready  
22 to proceed.

23 This is what happens when you end up in a bind  
24 because of problems relating to discovery, and you end up not  
25 having some experts that are ready to go, and then you attempt  
26 to maybe try to get another expert and make him do what --  
27 when you've got the use of a couple of others. That is the  
28 reaction of the Court originally. Whether that is the case or

1 not, I don't know.

2 MR. MONZIONE: I made --

3 THE COURT: You've made a representation to counsel  
4 that Dr. Shimkin was going testify about the general causes of  
5 cancer related to cigarettes. Certainly, he can so testify.  
6 I assume he was deposed to a great length on that question.

7 Now, you have indicated that you want him to  
8 answer some hypothetical questions. Those hypothetical  
9 questions relating to the general causes of cancer and any  
10 relationship between cancer and cigarettes. I am assuming  
11 that is no problem. If you're talking about hypothetical  
12 questions relating to the decedent, you have a real problem.  
13 I am not sure what you're referring to.

14 You can inform me at this point.

15 MR. MONZIONE: What I am referring to is hypothetical  
16 questions based on the evidence in this case which, of course,  
17 they must be in order to be properly put.

18 So, for example --

19 THE COURT: You are not answering the question, Mr.  
20 Monzionale.

21 MR. MONZIONE: I am not sure I understand the question.

22 THE COURT: I will explain it to you again. Are the  
23 hypothetical questions going to Mr. Galbraith, or are they  
24 going to relate to the general area of cigarettes and any  
25 causal relationship between those and cancer?

26 MR. MONZIONE: No.

27 To the latter part of your question, the answer  
28 is "no," because the doctor is going to talk about specific

1 causation between cigarettes and cancer.

2 THE COURT: Fine.

3 MR. MONZIONE: But the hypothetical medical questions  
4 that will be put will be based on the evidence in this case  
5 concerning Mr. Galbraith's medical history.

6 In other words, "if you take a patient who had  
7 emphysema, arteriosclerotic heart problems, a history of  
8 tuberculosis, pulmonary fibrosis, and you have that patient  
9 smoke two to three packs of cigarettes a day for "X" amount of  
10 years, do you have an opinion as to whether the smoking causes  
11 or exacerbates any of those health conditions?" which, of  
12 course, he'll say it does. So --

13 THE COURT: You were specifically -- Mr. Shimkin -- Dr.  
14 Shimkin was specifically asked whether he had any information  
15 concerning Mr. Galbraith at the time of the deposition, and he  
said, "No."

16 MR. MONZIONE: He still doesn't. He still doesn't.

17 What I plan to do is, as an expert witness, put  
18 him on the stand, pose a hypothetical question to him based on  
19 the evidence in this case, which are what hypotheticals must  
20 be based on --

21 THE COURT: Tell me what you're going to offer.

22 MR. MONZIONE: I think the example I have just given  
23 the Court is an example of a question that we could expect to  
24 be put to Dr. Shimkin.

25 THE COURT: Repeat it so I make sure I have it.

26 MR. MONZIONE: I don't intend by this to be locked into  
27 the specific question. But to give the Court a general idea

1 of what I am talking about: That is, "If there is a patient  
2 who has a history of emphysema, arteriosclerotic heart  
3 disease, pulmonary fibrosis, was diagnosed in the early stages  
4 of his life as having tuberculosis and, if that patient, from  
5 the time he was a certain age, smoked between two and three  
6 packs of cigarettes a day continuously, et cetera, do you have  
7 an opinion as to whether cigarette smoking in that patient  
8 either caused or exacerbated any of those illnesses? If so,  
9 what is that opinion; if so, what illnesses were caused, what  
10 were exacerbated?" that kind of thing.

11 THE COURT: There is a big difference between cause and  
12 exacerbated.

13 MR. MONZIONE: Well, I am after cause, but the proof in  
14 this case will be a factor which is all we'll have in a  
15 products liability case with concurrent causes. So, the idea  
16 of exacerbation is essential.

17 I plan to ask the Doctor -- we are going to have  
18 to prove causation; but, to the extent we'll prove that other  
19 illnesses were exacerbated -- I left out an essential element.  
20 That is the person with the bronchogenic squamous cell lung  
21 cancer was given six thousand rads of radiation treatment.  
22 Under those circumstances, et cetera.

23 Dr. Shimkin did have that much general  
24 information at the time of his deposition. He had not  
25 reviewed any of the medical records; but he knew, for example,  
26 that we were dealing with a bronchogenic carcinoma, squamous  
27 cell-type. He knew that the man that had it was a heavy smoker.  
28 He knew there were six thousand rads of radiation administered

2 1 to the patient.

2 Aside from that, I am not going to give Dr.  
3 Shimkin any medical records other than that hypothetical  
4 question.

5 THE COURT: Assume that you ask Dr. Shimkin, "If  
6 somebody smoked for forty years two or three packs a day," is  
7 he going to say -- "does that cause or exacerbate any other  
8 medical problems he has?" I am assuming he would say "yes,"  
9 because that is essentially the same thing.

10 MR. MONZIONE: That's correct.

11 THE COURT: So, his testimony would be, "If somebody  
12 smoked two or three packs of cigarettes a day, it exacerbates  
13 any other medical problems he has." From a practical  
14 standpoint that is the same thing, isn't it?

15 MR. MONZIONE: Well, I think I would like to tie it  
into the evidence in this quite a little more specifically by  
asking: "If you have a patient who has a history of  
16 emphysema, arteriosclerotic heart disease, et cetera, et  
cetera; or whether, for example, a patient is given six  
17 thousand rads who has pulmonary fibrosis, whether that  
18 exacerbates the condition." I am talking hypothetical.

19 I am not going to introduce a medical record  
20 about John Galbraith and say: "Do you have an opinion as to,  
21 say, what caused his death?"

22 Counsel had full and fair opportunity at the  
23 deposition to put whatever hypothetical questions they deemed  
24 appropriate at that time. The fact they chose not to should  
25 not penalize plaintiffs in this case.

1 THE COURT: Mr. Weber, I would like to hear from you.

2 MR. WEBER: I am afraid I am being sandbagged here.

3 THE COURT: You are trying to be sandbagged. The  
4 question is how far it goes and what is fair under the  
5 circumstances.

6 MR. WEBER: I would like to, in response to petitioner,  
7 cite, on page 4 and 5 of the brief, where Mr. Monzine said  
8 that the only testimony would be on the general causation of  
9 whether smoking can cause cancer, nothing about any specific  
10 human being just the grand question: Can smoking cause lung  
11 cancer? That is what he said the deposition was limited to,  
12 and I stated that.

13 THE COURT: I have read it.

14 MR. WEBER: What they are trying to do now, as your  
15 Honor correctly noted, is take the past expert problem where  
16 Judge Stevens found they hadn't exercised good faith under the  
17 expert designation rule and try to use a witness that wouldn't  
18 testify that way.

19 Page 243, (reading):

20 "Let's address one more matter of  
21 housekeeping which is the scope of Dr. Shimkin's  
22 testimony as you and I just discussed it.

23 "The understanding that Dr. Shimkin  
24 is called by the plaintiffs not to speak about  
25 specific causation with respect to Mr. Galbraith,  
26 but to speak to the general causation subject,  
27 and the deposition is going to continue on that  
28 understanding.

1                    "If at some later date the plaintiffs  
2                    wish to request Dr. Shimkin to testify in other  
3                    areas, they will make him available and discuss it  
4                    with us, and we will determine at that time what  
5                    the basis for proceedings is.

6                    "MR. MONZIONE: That's correct."

7                    This was August 29. There were six weeks left.

8                    MR. MONZIONE: I stand on that now. I am not changing  
9                    what I said there in any way. I am not going ask Dr. Shimkin  
10                  to testify as to the causation of Mr. Galbraith's death.

11                  THE COURT: But you're going to use the facts relating  
12                  to Mr. Galbraith and ask a hypothetical. You don't see any  
13                  conflict there?

14                  MR. MONZIONE: Not at all.

15                  THE COURT: I do.

16                  MR. MONZIONE: You have to assume these lawyers for  
17                  Reynolds understand the subject of hypothetical questions in  
18                  deposition and at trial. I have to assume that, when I say  
19                  something specifically at a deposition that Dr. Shimkin will  
20                  not testify as to Mr. Galbraith -- because one of the things  
21                  they told me was, if you're going to have him testify as to  
22                  Mr. Galbraith, you better have this man review the huge volume  
23                  of medical records pertaining to that issue, and I informed  
24                  them that Dr. Shimkin would not be reviewing those medical  
25                  records.

26                  However, that does not preclude him, as a  
27                  witness, from testifying hypothetically in this case on the  
28                  general causation questions.

1                   THE COURT: I think it does preclude him, because I  
2 don't think you would deliberately set forth the -- he would  
3 not do so. He would not testify with regard to any  
4 individual.

5                   You're attempting now to have him testify to an  
6 individual. If you want Dr. Shimkin to testify hypothetically  
7 about whether cigarette smoking causes, exacerbates other  
8 disease, I will allow that. I don't think that is any  
9 different than talking about the general public, because he  
10 could certainly -- if he believes that, he could say that  
11 about anybody. It doesn't relate to Mr. Galbraith.

12                  MR. BELLI: Would you give that to us again? I didn't  
13 get that.

14                  THE COURT: I will repeat it.

15                  MR. WEBER: Could I be heard briefly on that?

16                  THE COURT: Yes.

17                  MR. BELLI: We have it --

18                  THE COURT: I want to hear one person talking at a  
19 time. Right now, it will be me.

20                  Mr. Weber, I will hear from you. Then I will  
21 hear from from Monziona and Mr. Belli if necessary.

22                  MR. WEBER: What your Honor just said is that he could  
23 talk about specific medical situations in a hypothetical  
24 sense -- that is, can tobacco smoking exacerbate or cause a  
25 certain individual's illness? -- is specifically what they  
26 said he wasn't going to talk about. It involves illnesses  
\* 27 other than lung cancer.

28                  At the bottom of page 4 of the brief, they

1 represented to us causation between tobacco and lung cancer.  
2 The literature here, your Honor, is enormous. It took us a  
3 day to take a lung cancer deposition. We had no idea that  
4 they were going to offer this man with respect to fibrosis or  
5 radiation or emphysema or heart disease or anything else. It  
6 was specifically stated time and again: lung cancer.

7 THE COURT: That is -- I stand corrected. You're  
8 absolutely right. Page 307 and 308 of the deposition, which  
9 is set forth, specifically says "lung cancer."

10 MR. MONZIONE: Those are Mr. Weber's words that he  
11 keeps putting in my mouth for some reason.

12 THE COURT: Your answer is, "With the only qualifying  
13 remark that..." --

14 MR. MONZIONE: That is a typo by the way. Where it  
15 says, "...remark being that should that vary," "that" and  
16 "should" are reversed. It said -- it should say, "...should  
17 that vary."

18 THE COURT: I'll accept that. That doesn't change the  
19 meaning.

20 MR. MONZIONE: I want to be grammatically correct, your  
21 Honor. It's important to me.

22 THE COURT: All right.

23 What you said is that Mr. Weber -- I assume this  
24 is Mr. Weber -- was correct. So, when you said "put words in  
25 your mouth," you adopt his words.

26 MR. MONZIONE: Well, I did it by saying, "We reserve  
27 our right to tender Dr. Shimkin as an expert in tar and --

28 Page 4: "We reserve our right to tender Dr.

1 Shimkin as an expert in that regard and to make him available  
2 for continuation on redeposition."

3 THE COURT: There is a declaration in here that you  
4 didn't do it.

5 MR. MONZIONE: I don't know what it is we didn't do  
6 except that we let it be known to counsel that we would ask  
7 hypothetical questions of these experts, and they never asked  
8 to take his deposition. I think they could depose him now.

9 THE COURT: When did you do that? You expect them to  
10 take depositions right now?

11 MR. MONZIONE: No.

12 But we did it at the first opportunity. I think  
13 the point is, your Honor, more than --

14 THE COURT: Wait.

15 When did you do it? When did you tell R.J.  
16 Reynolds that Mr. Shimkin was available for redeposition other  
17 than just this moment when you said to it me?

18 MR. MONZIONE: We didn't say that Dr. Shimkin was  
19 available for redeposition. That is something that is up to  
20 them to do. If they want to redepouse this man, they have to  
21 renounce or let me know. I would have made him available.  
22 They never did that.

23 THE COURT: When did you tell them that you wanted to  
24 ask Dr. Shimkin hypothetical questions relating to the  
25 condition of Mr. Galbraith?

26 MR. MONZIONE: Well, that was done pretrial, probably  
27 during the motions in limine. But I don't think that it's  
28 incumbent upon me as plaintiffs to inform the defendants we're

1 going to ask hypothetical questions of our experts. That is  
2 custom and practice of trial practice to ask an expert a  
3 hypothetical question. They could have assumed as much.

4 Now, what they are trying to do is limit the  
5 scope of Dr. Shimkin's testimony because they failed to ask  
6 him such questions on deposition.

7 THE COURT: No. No. They were limiting it based on  
8 what you said. If you had said, "We are going to ask him  
9 everything under the sun, the moon and the stars," then it  
10 would be different. You said that he was going to be asked  
11 only about tobacco and lung cancer.

12 MR. MONZIONE: Well, I think that hypothetical  
13 questions are properly within that realm, your Honor.

14 THE COURT: About tobacco and lung cancer?

15 MR. MONZIONE: Correct.

16 THE COURT: Now, if you want to ask him hypothetical  
17 questions about tobacco and lung cancer that don't relate to  
18 Mr. Galbraith, that is perfectly okay. I don't -- I am not  
19 suggesting that you can't do that.

20 MR. MONZIONE: I did it based on the evidence in the  
21 case. So, I am in a dilemma.

22 I would be willing to request at this point  
23 permission to ask Dr. Shimkin hypothetical questions based on  
24 the medical evidence in this case regarding the causation of  
25 lung cancer from cigarette smoking.

26 THE COURT: I am not sure what you mean.

27 MR. MONZIONE: In other words, to pose hypothetical  
28 questions to Dr. Shimkin: Based on the medical evidence in

1       this case, does he have an opinion as to whether smoking in  
2       this hypothetical situation was a cause of the bronchogenic  
3       carcinoma, and have him answer that question.

4       THE COURT: You're going to tell me that he's going to  
5       say that every bron -- I can't even say the word.

6       MR. MONZIONE: Lung cancer.

7       THE COURT: Every lung cancer from a person who smokes  
8       is caused by cigarettes. Otherwise, he couldn't possibly say  
9       it. If you're going to have him testify to that --

10      MR. MONZIONE: He wouldn't say that, your Honor.

11      THE COURT: I have a feeling he might not.

12      MR. MONZIONE: I would like to have him say, "If you  
13     have a patient who has this medical background, who has this  
14     cigarette habit and smoked for this amount of years, do you  
15     have an opinion as to whether the lung cancer of that patient  
16     was caused by cigarette smoking?" and have him answer that.  
17     Of course, the hypothetical issue that I give him will be  
18     based on the medical evidence in this case.

19      THE COURT: That's exactly what you said you wouldn't  
20     do.

21      MR. MONZIONE: I have never said I wouldn't ask  
22     hypothetical questions based on the evidence in this case,  
23     your Honor. I didn't state that in the deposition, and I  
24     didn't state it in pretrial. In fact, at pretrial I said just  
25     the opposite: that we would.

26      THE COURT: I am going to allow you to ask hypothetical  
27     questions. They will be hypothetical, not based on Mr.  
28     Galbraith but based on the hypothetical individual, if you

4       1 wish, concerning smoking and lung cancer. If you wish to ask  
5       2 Dr. Shimkin hypothetical questions concerning the general area  
6       3 of smoking and lung cancer, you may do so.

7                  4 If it starts to look a whole lot like the  
8       5 deceased in this case, I will undoubtedly have Mr. Weber  
9       6 standing up, objecting; and it's likely to get sustained.

7                  7 MR. MONZIONE: Certain things will be in common: "If I  
8       8 have a person who smokes cigarettes and develops lung cancer,  
9       9 that is..." --

10                 10 THE COURT: I am not going tell you where the line is.  
11       11 If you cross it and he stands up and objects, you'll know it.

12                 12 MR. WEBER: We are going to be -- the defense is going  
13       13 to be in the position -- because I've seen this already and I  
14       14 know what will happen -- of looking like we are  
15       15 obstructionists because we ended up taking a deposition basing  
16       16 it on a representation he made saying only general causations,  
17       17 nothing about an individual.

18                 18 THE COURT: There is not going to be anything about an  
19       19 individual. I just stated that.

20                 20 MR. WEBER: I can almost predict -- and I'll have to  
21       21 stand up, because they will go so close to the line on the  
22       22 hypothetical.

23                 23 THE COURT: I think you're right. Stand up and make  
24       24 your objection when it comes up. I can't do anything more  
25       25 than try to give you the general outline.

26                 26 I hope I have done that. If there are any  
27       27 questions about it, I would like to hear about it.

28                 28 Now, does everybody understand?

1                   MR. MONZIONE: I think I understand.

2                   MR. NYHAN: May I have leave to approach another  
3 matter? Do you want to take it in tonight or tomorrow? We  
4 would like to move the admission into evidence of a number of  
5 exhibits. We could do it now or in the morning, however you  
6 like.

7                   THE COURT: Let's do it now.

8                   Have you checked with Mr. Monzione or Mr. Belli  
9 to see if there is any objection?

10                  MR. NYHAN: I think there is an objection, at least to  
11 the medical records. We have a stipulation that the medical  
12 records, business records, under Evidence Code Section 1271 --

13                  THE COURT: Let me stop you.

14                  MR. BELL: We are going to strenuously object to all  
15 and everything after this. We object to these, your Honor.

16                  THE COURT: We'll take this up tomorrow sometime.

17                  (Whereupon, the evening adjournment was  
18 taken until Wednesday, November 27, 1985  
19 at 9:00 a.m.)

20

21

22

23

24

25

26

27

28